

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MEHDI ASNAASHARI.

**Plaintiff,**

No. C 13-1308 PJH

v.

PNY TECHNOLOGIES, INC.

**Defendant.**

## **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS**

13 Defendant PNY Technology Inc.'s motion to dismiss plaintiff's amended complaint  
14 came on for hearing before this court on August 21, 2013. Plaintiff Mehdi Asnaashari  
15 ("plaintiff") appeared through his counsel, Jeannette Vaccaro. Defendant PNY  
16 Technologies, Inc. ("defendant") appeared through its counsel, Christopher Mayer. Having  
17 read the papers filed in conjunction with the motion and carefully considered the arguments  
18 and the relevant legal authority, and good cause appearing, the court hereby GRANTS in  
19 part and DENIES in part defendant's motion as follows.

20 Plaintiff's first cause of action is for breach of contract. Plaintiff concedes that his  
21 offer letter characterized his employment as "at will," and specifically stated that his  
22 employment "may be terminated by PNY at any time, with or without notice," but argues  
23 that the letter also stated that his employment was "subject to PNY's employment policies."  
24 Dkt. 34, Ex. B at 2. Plaintiff alleges that defendant violated those policies by terminating his  
25 employment for performance reasons without following the applicable procedures  
26 governing performance-related terminations. In dismissing this cause of action as pled in  
27 the original complaint, the court noted that plaintiff had "not identified the specific policies or  
28 procedures that were allegedly breached." Dkt. 25 at 1. However, plaintiff's amended

1 complaint (“AC”) identifies three such policies: (1) “Human Resources must approve any  
2 involuntary terminations, before they occur,” (2) if “any employee” is involuntarily terminated  
3 due to “unsatisfactory performance, the employee must be informed of the performance  
4 problem and given a reasonable opportunity to correct the problem, before any termination  
5 can occur,” and (3) “any performance problems and related communication must be  
6 documented and tracked in the employee file.” AC, ¶¶ 36, 37. Thus, plaintiff’s amended  
7 complaint has cured the deficiencies of his original complaint, and the court DENIES  
8 defendant’s motion to dismiss plaintiff’s first cause of action.

9 Plaintiff’s second cause of action is for breach of the implied duty of good faith and  
10 fair dealing. Plaintiff argues that this claim is based on two separate theories: (1) PNY  
11 terminated plaintiff in order to deprive him of the benefits outlined in the offer letter; i.e.,  
12 PNY terminated plaintiff in bad faith; and (2) PNY terminated plaintiff in violation of its own  
13 policies and procedures governing involuntary termination for unsatisfactory job  
14 performance. The court notes that (2) is duplicative of plaintiff’s breach of contract claim,  
15 and DISMISSES plaintiff’s second cause of action to the extent premised on that theory.  
16 See also Guz v. Bechtel Nat. Inc., 24 Cal.4th 317, 352 (2000) (“insofar as the employer’s  
17 acts are directly actionable as a breach of an implied-in-fact contract term, a claim that  
18 merely realleges that breach as a violation of the covenant is superfluous.”). As to (1), the  
19 Guz court went on to hold, separately, that “[a]llegations that the breach was wrongful, in  
20 bad faith, arbitrary, and unfair are unavailing; there is no tort of ‘bad faith breach’ of an  
21 employment contract.” Id. Thus, plaintiff’s second cause of action is DISMISSED in its  
22 entirety. Because plaintiff has already had an opportunity to amend this claim, the  
23 dismissal is with prejudice.

24 Plaintiff’s third cause of action is for promissory fraud. The elements of promissory  
25 fraud are: (1) a promise made regarding a material fact without any intention of performing  
26 it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent  
27 to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the  
28 promisee; (5) nonperformance by the party making the promise; and (6) resulting damage

1 to the promisee. Behnke v. State Farm General Insurance Co., 196 Cal.App.4th 1443,  
2 1453 (2011).

3 Plaintiff argues that the relevant “promise” here consists of (1) statements from Gadi  
4 Cohen, PNY’s founder, regarding plaintiff’s bonuses and stock options, and (2) statements  
5 in PNY’s offer letter, regarding bonuses, stock options, severance pay, and that plaintiff’s  
6 employment would be “subject to PNY’s employment policies.” AC, ¶¶ 55, 56. However,  
7 the court finds that any representations regarding bonuses, stock options, or severance  
8 pay were conditioned on plaintiff reaching one year of employment. Thus, there was no  
9 actual “nonperformance” of those alleged promises. The only unperformed promise  
10 identified by plaintiff is the promise that plaintiff’s employment would be governed by PNY’s  
11 employment policies, which are discussed above in the context of plaintiff’s breach of  
12 contract claim. Thus, to the extent premised on anything other than PNY’s employment  
13 policies, plaintiff’s third cause of action is DISMISSED without leave to amend. But to the  
14 extent that plaintiff’s third cause of action is premised on PNY’s employment policies, the  
15 motion to dismiss is DENIED.

16 Plaintiff’s fourth cause of action is for negligent misrepresentation. The elements of  
17 negligent misrepresentation are: (1) a misrepresentation of a past or existing material fact;  
18 (2) without reasonable grounds for believing it to be true; (3) with intent to induce another’s  
19 reliance on the fact misrepresented; (4) ignorance of the truth and justifiable reliance  
20 thereon by the party to whom the misrepresentation was directed; and (5) damages. Fox v.  
21 Pollack, 181 Cal.App.3d 954, 962 (1986). For this cause of action, plaintiff identifies the  
22 same alleged misrepresentations that were identified with respect to plaintiff’s third cause  
23 of action (for promissory fraud). And for the same reasons described above, to the extent  
24 that plaintiff’s claim is premised on anything other than PNY’s employment policies, his  
25 fourth cause of action is DISMISSED without leave to amend. But even as to the  
26 employment policies, the court finds that there was no misrepresentation of “past or  
27 existing material fact.” Instead, any alleged misrepresentation related to PNY’s future  
28 conduct in terminating plaintiff’s employment without following its own policies. Thus,

1 plaintiff's fourth cause of action is DISMISSED in its entirety. Because plaintiff has already  
2 had an opportunity to amend this claim, the dismissal is with prejudice.

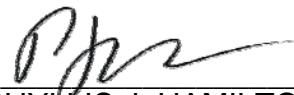
3 Finally, plaintiff asserts a fifth cause of action for wrongful termination in violation of  
4 public policy. Plaintiff alleges that he was terminated one day before his bonus and stock  
5 options were set to vest in order to deprive him the benefit of that compensation. While  
6 plaintiff has not provided extensive support for this allegation, the timing of his termination  
7 does make plaintiff's claim plausible enough to survive the pleading stage. Accordingly,  
8 defendant's motion to dismiss plaintiff's sixth cause of action is DENIED.

9 As a result of this order, plaintiff has three remaining causes of action: (1) breach of  
10 contract (based on PNY's alleged failure to follows its employment policies governing  
11 performance-related termination); (2) promissory fraud (based on the same conduct); and  
12 (3) wrongful termination in violation of public policy. Defendant has 21 days from the date  
13 of this order to file an answer to those remaining claims.

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15 **IT IS SO ORDERED.**

16 Dated: August 26, 2013



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17 PHYLIS J. HAMILTON  
18 United States District Judge

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